In the Supreme Court of the Hawaiian Islands. In Banco. Special Term. February, 1888.

THE KING VS. LEE FOOK.

An application for Attachment against Lum Kum Cheung, Ching Cheung Ping and H. M. Whitney for contempt.

BEFORE JUDD, C. J., M'CULLY J., PRESTON J., BICKERTON J. AND DOLE J.

Opinion of the Court by PRESTON, J.

On the sixth day of January last Lee Fook was committed for trial at the then next ensuing term of the Supreme Court on a charge of perjury alleged to have been committed by him in swearing to the truth of certain statements contained in a petition presented by him to the Chief Justice for a writ of habeas corpus for the release of certain Chinese women and girls alleged to be unlawfully detained.

On the 14th day of January, Lum Kum Cheung published in the "Hawaiian Chinese News" of which the said Lum Kum Cheung was editor and manager, a proclamation purporting to be issued by a society styled The United Chinese Society, reflecting upon the said Lee Fook.

This proclamation was also published in the English language in the *Daily Hawaiian Gazette* in its issue of the 18th of January and in the weekly edition of the "HAWAIIAN GAZETTE" of the 24th.

It was charged and admitted that H. M. Whitney, the manager and publisher of the Gazette was instigated by one Ching Cheung Ping to publish the said proclamation.

On the application of Lee Fook an order was made by this Court on the 15th day of February for the said Lum Kum Cheung Ching Cheung Ping and Henry M. Whitney to show cause why an attachment should not issue against them for contempt of Court in making the publications aforesaid.

The article complained of reads as follows:

Chinese Female Traffic—Important Proclamation by the United Chinese Society.

Below is a translation of posters about town in the Chinese language. The document explains itself:

This is to notify that many decent and respectable Chinese women and girls are kidnapped in Canton, Hongkong, and other places, for the purpose of being shipped to California for immoral purposes, and complaints have been made to the Viceroy at Canton, China, by the parents or guardians, and the Viceroy has examined into these complaints and sent a cablegram to the Commissioner, Cheung, at Washington, directing him to report to the Consul-General at San Francisco and to order that a strict investigation must be made as each steamer arrives in San Francisco from Hong Kong.

In the early days of the ninth moon a cablegram from the Chung Wah Hospital, Hong Kong, was received by the Consul-General, Leung, complaining that plenty of women and girls had been kidnapped on the way to San Francisco. The Belgic, on her arrival at San Francisco, was examined, and it was found that more than 50 women and girls, most of whom had been kidnapped, were on board. The report made asked the authorities to arrest Wong Hung, and these women and girls accused Wong Hung of kidnapping them. He was sentenced to 10 years' imprisonment and $2,000 fine on being found guilty, and the women and girls were ordered to be returned to the Chung Wah Hospital, Hong Kong, requesting them to transfer the women and girls to the Viceroy for investigation of their case.

These women and girls were shipped from San Francisco to Hong Kong on board the San Pablo, which touched at Honolulu on the voyage. Li Fook, who lives at Honolulu, hearing about these women and desiring a monopoly to earn money by them, applied to the Supreme Court, making an affidavit that Luk Moi was his wife, Cheu Ho his daughter-in-law, and Ah Moi and Hoi Cheu his daughters. He engaged a lawyer to get these women and girls from the vessel, and this was with the view to his making money by their immoral practices.

This is treating our law with disrespect and a practice of great cruelty. The members of our society and the Chinese Commercial Agents have performed their duty and endeavored to procure an order to cause these women and girls to proceed on their voyage in order to do as the Viceroy had wished, and thus to permit them to have the happiness of a family gathering. The Chief Justice found no law to prevent these women and girls from landing of their own own accord and they landed. Luk Moi was subsequently, with Li Fook, charged before the Police Court at Honolulu with perjury. Luk Moi was acquitted and discharged, and Li Fook was committed for trial at the January Term of the Supreme Court.

With regard to Li Fook's false representation and his desire to make money in the bad way he tries, it is considered he is no better than the kidnapper, and must be punished for this serious offense. No one can pity such a man. It is said that plenty of people privately help this man with money to carry on his bad conduct. It is the duty of our Society to petition the Commissioner at Washington, who will take action and report to the Viceroy, who will do his duty and cause the guilty parties to be punished; but we are afraid that these people who help Li Fook are perhaps ignorant of the true facts and the law, and we will not petition as we intended. It is therefore hereby made known that if any person or persons help Li Fook in any way hereafter, the petition will go, with the names of these parties attached, and no excuses made. You are expected to listen to all this, and take care accordingly.

UNITED CHINESE SOCIETY.

Dated January, 1887.

Upon the argument it was contended that the mere fact of Li Fook having been committed for trial did not make his case pending in this Court and that the publication was made in good faith and without any intention to prejudice the fair trial of the defendant.

We are of opinion that when a person is committed for trial in this Court the case is at once pending in this Court, otherwise it would be impossible for the crown or the defendant to enforce the attendance of witnesses at the trial by subpœna until an indictment was found which would in many cases prevent the defendant having his trial for some months.

We are also of opinion that the publication in question is a contempt of this Court, according to its decision in other cases, as tending to prejudice the right of the defendant to a just and impartial decision of his case and to embarass and obstruct the course of justice.

The respondents having disclaimed any improper motive, and it appearing that the defendant has been discharged by a demurrer to the indictment being allowed, the Court are not disposed to inflict any punishment upon the respondents and therefore discharge the order.

V. V. Ashford for Li Fook; A. S. Hartwell for respondents.

Honolulu, April 28th, 1888.

Dissenting opinion of Dole, J.

I doubt whether the mere committal of Li Fook for trial in the Supreme Court gave the Supreme Court jurisdiction over the case. The statute of 1876, on procedure in criminal cases, confers exclusive discretion upon the Attorney-General in regard to persons committed for trial, whether to indict or to discharge them. He takes the place of the grand jury in other judical systems. Until the Attorney-General has presented an indictment against the accused, the Supreme Court has no authority to take cognizance of the case; it is not a "pending trial" before it, and therefore the publication in question, if objectionable, was not a contempt of this Court. "The word jurisdiction (*jus dicere*) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject matter, from the finding the indictment to pronouncing the sentence. * * * To have jurisdiction is to have power to inquire into the fact, to apply the law and to declare the punishment in a regular course of judicial proceeding." *Hopkins vs. The Commonwealth*, 3 Metcalf R., 462. The Supreme Court had no authority to try the case of *The King qs. Lee Fook* until an indictment was presented; the publication objected to was made before the presentation of the indictment. Bouvier, in Vol. I., page 769 of his Law Dictionary, states the same principle: "Jurisdiction of the cause is the power over the subject matter given by the laws of the sovereignty in which the tribunal exists."

The allusion by the majority of the Court to the inconvenience which would be entailed in relation to procuring the attendance of witnesses, if the rule set forth above should prevail, is rather an argument of expediency than of legal principle, and I cannot see how an inconvenience, however great, can affect the question of what is the law.

For these reasons I am compelled to differ from the majority opinion on the question of jurisdiction, and give as my conclusion that the publication in question is not a contempt of this Court.

In the Supreme Court of the Hawaiian Islands--In Equity. In Banco. April Term, 1888.

BISHOP & CO. VS. THE PACIFIC NAVIGATION CO.

On Appeal from the Chancellor.

JUDD C. J., M'CULLY J., PRESTON J., BICKERTON J. AND DOLE J.

Opinion of the Court by PRESTON, J.

[Mr. Justice Dole being interested as a creditor of the defendant took no part in this judgment.]

This is a suit for the foreclosure of a mortgage over 150 tons, more or less of cobra, laden on the bark "Lilian," said bark being at the time of the execution of the mortgage on a voyage from Jaluit, Marshall Islands to Honolulu.

The suit was commenced and process served on the 7th day of December last and a decree was made *pro confesso* on the 17th of the same month.

On the 10th of December the defendant made an assignment to W. F. Allen for the benefit of its creditors and on the 23d of January last a motion was filed on behalf of Mr. Allen to vacate the decree and to be allowed to answer.

The proposed answer was filed with the motion.

On the 31st of January the Chancellor after hearing counsel on both sides ordered that the decree be vacated and the answer allowed to be filed.

From this order the plaintiff appealed.

The Trustee, Mr. Allen, sets up by his answer, two matters.

1st. That at the date of the mortgage the cobra stated to be mortgaged had been sold and was not then the property of the defendant.

2d. That the mortgage was void, the defendant Company being at its date insolvent to the knowledge of plaintiffs.

On the argument before us it was urged on the part of the defendant that as the order made was purely discretionary and the exercise of discretionary power is not a subject of appeal, the appeal should be dismissed.

We are of opinion that an order opening a default, which this in effect is, is a matter of discretion not reviewable except in a clear case of abuse, which we do not consider has been shown in this case and therefore we decline to interfere with the order made.

At the hearing of the appeal, argument was made by counsel on both sides as to the effect of the deed of assignment upon the rights of the plaintiffs, counsel for the defendant contending that the trustee could set up the fraudulent nature of the deed as against the defendant's creditors.

We are, however, of opinion that in the absence of a statute upon the subject the Trustee cannot set up any defense which the defendant itself could not set up and consequently that the second answer would not be available for the defense.

We make this observation so that the parties may have the view of the Court upon the matter and conduct the case accordingly.

The first ground of the answer was not touched upon by counsel and we therefore refrain from expressing any opinion.

For the reason stated the appeal must be dismissed.

F. M. Hatch for plaintiff appellant; A. S. Hartwell for defendant.

Supreme Court of the Hawaiian Islands--In Banco. April Term, 1888.

IN THE MATTER OF VICTORIA FORTADO, AN INFANT, ETC., MARRIED UNDER LEGAL AGE.

An Appeal from decision of Bickerton, J.

BEFORE JUDD, C. J., M'CULLY, PRESTON, BICKERTON AND DOLE J. J.,

Opinion of the Court by PRESTON J.

This is an appeal by Pedro Fernandez against a decision of His Honor, Mr. Justice Bickerton, sitting in Chambers, declaring a marriage between the appellant and one Victoria Fortado null and void on the ground that the alleged wife was under the age of fourteen years at the time of the alleged marriage.

The action was commenced by a petition filed by Antone Moniz Fortado, the father of Victoria, against the appellant who was served with the petition and summons.

The defendant demurred to the petition on the ground that he alone was made a party defendant thereto, and claiming that Victoria, the alleged wife was a necessary party.

The demurrer was argued before the Chief Justice and overruled and the defendant appealed.

The appeal was heard at the last January Term and was allowed, the majority of the Court holding that "suits of this nature should be brought in the name of the minor by the parent or guardian and that this suit should have been brought in the name of Victoria Fortado by her father Antone Moniz Fortado, or in his own name, making the minor a party defendant."

The plaintiff had leave to amend and on the 8th day of February he filed a paper stating that he "amends his original petition herein as follows:" and states what the amendments are, but did not alter the original petition or file an amended one.

A summons was issued and served upon "Victoria Fortado" on the 8th February, requiring her to appear before Mr. Justice Bickerton on the 10th February "to answer the annexed petition of Antone M. Fortado."

There was annexed to the summons the amendments to the petition only. The original petition was not annexed.

The plaintiff did not obtain an order for the appointment of a guardian *ad litem* for the minor defendant, nor an order for substituted service.

Both defendants answered by counsel and the hearing took place on the 26th of February and the 5th of March, and a decision was rendered in favor of the plaintiff.

From this decision the defendant Pedro Fernandez appealed.

The appellant contends that as no guardian was appointed for the minor defendant, she was therefore not properly before the Court and the decision made is not binding upon the appellant.

We have carefully considered the various papers on file in this case, and the argument on behalf of the appellant.

There is no doubt that a marriage in fact between these parties has been established. To declare that marriage a nullity, every proceeding in the case must be regular.

We must consider what would be the position of any future husband or wife of these parties and of their children, should they have any, if these proceedings should be hereafter attacked and we must hesitate before giving a decision which would apparently affirm such nullity but still leave the question open.

We are of opinion that the petition has not been properly amended, and that as the female defendant has not been served with a copy of the petition, and no guardian ad litem having been appointed for her nor any order for substituted service upon her obtained, the female defendant has not been properly before the Court so as to be bound by any decree and therefore that the appeal must be allowed.

We think the whole of the proceedings taken since the decision of this Court allowing the demurrer have been irregular to such an extent as to vitiate everything purporting to have been done under them. At the same time we regret that objection was not taken at the hearing so that the time then taken up could have been saved.

The case should have been entitled as an action "Antone Moniz Fortado against Pedro Fernandez anv Victoria Fortado, falsely called Fernandez."

The plaintiff must pay the costs incurred since the former decision of this Court and also the costs of this appeal.

V. V. Ashford for plaintiff; Smith & Kinney for defendant.

Honolulu, April 26, 1888.

Concurring opinion by Dole, J.

The majority of the Court having already decided in an issue of law raised by demurrer in these proceedings that suits of this nature should be brought in the name of the minor by the parent or guardian or in the name of the parent or guardian making the minor a party defendant, and it appearing that the minor in in this case has not been represented in the proceedings as a party thereto, I concur in the above decision.

Supreme Court of the Hawaiian Islands--In Equity.

D. W. KANOELEHUA VS. A. J. CARTWRIGHT, TRUSTEE ESTATE OF THE LATE QUEEN DOWAGER EMMA.

BEFORE CHIEF JUSTICE JUDD.

This is a bill in equity to declare and enforce a resulting trust. The facts of this case are concisely stated as follows: One Pahau, wife of plaintiff, received in 1881 and 1882, some six thousand dollars as her distributive share of the estate of the late C. Kanaina, as one of his heirs, the same being proceeds of real estate. This money was placed by her in Mr. A. J. Cartwright's hands, and it was paid out by him on her orders from time to time. The plaintiff and his wife, Pahau, had not been living together for many years, but in the long and expensive litigation which Pahau engaged in to determine her rights in the estate of Kanaina, she was obliged to use her husband's name, and he readily gave her his co-operation in procuring witnesses, and assisted in every way in the litigation; but I think it is well established that though there was the appearance of reconciliation between them, they each continued the illicit relations with the paramours they had taken up with during the long separation. There is some evidence that plaintiff and his wife jointly signed the orders on the fund in Mr. Cartwright's hands. This is denied by Mr. Cartwright, but he does not produce the orders, and thinks he delivered them up to Pahau when he closed his accounts with her. I am of opinion that the plaintiff had not reduced this fund to his possession, and that it retained the character of real estate of his wife. The bill, moreover, alleges that it was plaintiff's wife's property.

After the death of Mr. Kanaina in 1877, Pahau, who had been one of his retainers, transferred her allegiance to Queen Dowager Emma. Mr. Cartwright was the Queen's agent and business manager, and this accounts for Pahau's putting her funds in his hands.

In 1881 and 1882 two parcels of land in Kauluwela, Honolulu, were purchased—one for $550 dollars, and another for $1,550—and paid for out of this fund in Mr. Cartwright's hands, and afterwards houses were erected upon them at Pahau's expense, and both she and plaintiff and several other retainers of Queen Emma's moved thither. Pahau lived there until her death in 1886, and plaintiff continued there until ejected by process of law a few months ago. In both of the conveyances of the lands in question Queen Emma is the grantee, and the name of plaintiff or Pahau nowhere appears in them.

Mr. Cecil Brown testifies that he drew the conveyance for the second piece purchased (the consideration for which was $1,550); that Pahau told him to make the deed in the Queen's name. Upon Mr. Brown's asking her why she wished it so done, she said the money came from Kanaina's estate; that her husband Kanoelehua had deserted her, and she wished the property so fixed that he should have nothing to do with it; that she had an understanding with the Queen that she (Pahau) was to live on the land and take the rents, and that she would trust the Queen's word, although no life estate was reserved to herself in the deeds. Other witnesses say that Pahau wished the land put in the Queen's name lest Kenoelehua should mortgage the land, and she (Pahau) eventually lose it. Miss Lucy Peabody, an attendant of the Queen, who negotiated the first purchase for $550, says Pahau directed the conveyance to be in the Queen's name, so that her (Pahau's) husband should have nothing to do with it. I think that all allegations of feebleness of intellect and ignorance on the part of Pahau, and charges of fraudulent advantage taken of this by respondent are not sustained.

I find it to be established that plaintiff knew of the disposition of this property at the date of the deeds or soon after.

The question of law remains. Do these facts show that a trust has resulted in favor of plaintiff?

The law as laid down in Perry on Trusts, 1 vol., § 126, was adopted by this Court in *Olepau et al. vs. Rahapa et al.*, October Term, 1887, "Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." "This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes."

In 2 Story, § 1201, the author says: "Where a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money. This as an established doctrine is now not open to controversy.

Bispham says, Section 80: "The reason of this doctrine is, that the man who pays the purchase money is supposed to become, or to intend to become, the owner of the property and the beneficial title follows that supposed intention." Adams' Equity, Section 33, says: "Resulting trusts, where the intention to sever the legal and equitable ownership is apparent from the attendant circumstances, occur where the estate has been purchased in the name of one person, and the purchase money or consideration has proceeded from another. In this case, the presumption of law is that the party paying for the estate intended it for his own benefit, and that the nominal purchaser is a mere trustee."

But it is contended that "as a resulting trust may be shown by parol proof, as a presumption of law arising out of the transaction, so the presumption may be rebutted by parol proof, showing that no trust was intended by the parties, and that it was the intention to confer the beneficial interest upon the supposed nominal purchaser." 1 Perry, § 139. The same section reads further: "As the resulting trust is a mere matter of equitable presumption, it may be rebutted by facts that negative the presumption; and whatever facts appear tending to prove that it was intended that the nominal purchaser should take the beneficial interest, as well as the legal title, negatives the presumption."

It must also be borne in mind that "the *presumption* is in favor of the trust resulting to the party paying the consideration, and the burden of proof is upon the mere nominal purchaser to show that he was intended to have some beneficial interest." Id.

Although there is evidence that Queen Emma contributed to the support of Pahau from the time of Kanaina's death until she received her share of his estate, one witness testifying to the sum of $40 per month, there is no explicit evidence that this support was the reason why the deed was put in Queen Emma's name, and was to stand as its consideration.

On the contrary, Mr. Brown and Miss Peabody, the only witnesses who testify as to Pahau's declarations made at the time the deeds were made, say that the reason that Queen Emma's name was placed in the deeds was in order that Pahau's husband might have nothing to do with the land.

The contribution by a chief of these islands towards the support of a retainer is nothing unusual, and the Queen might well have supported Pahau without the expectation of receiving the conveyance of this land.

It is not claimed by the respondent that this purchase and conveyance were intended to be an "advancement" to Queen Emma. The presumption of an advancement arises when "the purchaser takes the conveyance in the name of a wife, child or other person for whom he is under some natural, moral or legal obligation to provide." Perry, § 148.

There was no such obligation on the part of Pahau. She was not bound to provide for Queen Emma. On the contrary, the obligation, if any, was on the part of the Queen to provide for her retainer.

I am aware of the feeling of obligation entertained by some of the old Hawaiians to leave their property to their aliis; but this is a purely voluntary consequence of loyal respect and fealty, and is not an obligation that the Courts could recognize as binding, or one that should be favored as against heirs at law.

To my mind these circumstances do not rebut the presumption that Pahau intended the Queen to be her trustee.

The fact that the nominal purchaser (Queen Emma) is dead does not affect the admissibility of parol testimony to show the resulting trust. Perry, § 138.

Nor does the fact that Pahau is dead affect the right of her heir at law to bring this bill. Although the collateral purpose for which the conveyances were made was to prevent the exercise of the present plaintiff, as Pahau's husband, of his marital rights over this property, and this purpose would apparently be defeated by finding that a trust resulted in favor of Pahau, this husband being now her heir-at-law, Pahau's intention was that she, and not Queen Emma, having advanced the purchase money, was to be benefitted by the transaction, and the incident that, on her death, her husband is her sole heir is one that the respondent, representing Queen Emma's estate, cannot take advantage of.

Upon the whole case, I find that trust has resulted in favor of Pahau, and the plaintiff as an heir may have the relief prayed for.

Decree accordingly.

W. C. Achi, for plaintiffs; W. A. Kinney, for defendant.

Honolulu, April 20, 1888.

Firemen's Meetings.

At an adjourned meeting of the Pacific Hose Company on Wednesday evening, the resignation of Mr. J. D. Tucker, as a candidate for the election of engineers, was received and accepted.

Engine Company No. 1 met at their hall, King street, Mr. Toulssant, Assistant Foreman, presiding. The usual routine of business was gone through, but nothing of special interest transpired. Fourteen members were present. The Company adjourned to the 17th inst.

Engine Company No. 2 met at their hall, Union street. The delegate to that body reported that the Fire Department would carry out the resolution limiting the number of voting members of each Company, at the Engineers' election, to fifty. After several motions and amendments had been made, discussed and withdrawn, it was carried that No. 2 pay for the printing of their own tickets and posters at the coming election. Fifteen members were present. The nomination of candidates for engineers was, on motion, postponed to a special meeting to be held at the call of the foreman.

The Fire Department.

Thursday evening the monthly meeting of the Fire Department was held, with an attendance of forty members. First Assistant Engineer Hustace presided, and Secretary Henry Smith was "on the brakes" as usual.

After routine business was despatched, the result of the poll taken, recently, on the amendment to Article 21 of the Constitution, was announced as having been the defeat of the measure.

A letter from Chief Engineer Wilson, now on Molokai island, was read and acted upon. It reminded the Board of the coming election, with the duties of preparing therefor, and accordingly Mr. Smith, Secretary, was appointed presiding officer of the poll, with Messrs. Henry Kaia and Lau Chong as tellers.

A motion for the appointment of a credential committee of three, to supervise the list of membership from each company, was lost. There was a discussion upon the limitation of voting members to fifty for each company, the preponderance of opinion being seemingly in favor of that provision. It appeared probable that the resolution of July 14, 1887, in that regard, would govern the coming election.

Smallpox in San Francisco.

The Board of Health has supplied the following statement of daily cases of smallpox, verified by the Board of Health, San Francisco:

March	18	2	cases	April	7	2 cases
"	19	1	"	"	8	0 "
"	20	2	"	"	9	0 "
"	21	1	"	"	10	0 "
"	22	0	"	"	11	1 "
"	23	0	"	"	*12	6 "
"	24	0	"	"	13	2 "
"	25	0	"	"	14	0 "
"	26	0	"	"	15	0 "
"	27	0	"	"	16	1 "
"	28	0	"	"	17	1 "
"	29	0	"	"	18	1 "
"	30	0	"	"	19	0 "
"	31	2	"	"	20	0 "
April	1	1	"	"	21	1 "
"	2	1	"	"	22	0 "
"	3	1	"	"	23	0 "
"	4	0	"			
"	5	1	"	Total.....		27 cases
"	6	0	"			

*From China steamer.
April 23d, 18 cases in hospital.